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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 723

DOUGLAS ROSE, ANDREW MEDLIN, DAVID SAMBO PULLEY, et al., *Petitioners.*

v.

HARRIET COTTON MILLS AND HENDERSON COTTON MILLS, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the Supreme Court of North Carolina relating hereto are reported as follows:

No. Below	Citation	Record
385	251 N.C. 218, 111 S.E. 2d 457	R. p. 201
386	251 N.C. 231, 111 S.E. 2d 465	R. p. 138
388	251 N.C. 248, 111 S.E. 2d 467	R. p. 85
390	251 N.C. 254, 111 S.E. 2d 480	R. p. 53
391	251 N.C. 335, 111 S.E. 2d 484	R. p. 81

QUESTIONS PRESENTED

When a defendant in a civil action in a state court, represented by counsel, makes no objection to the introduction of evidence in the form of affidavits, and makes no exception thereto on appeal to the Supreme Court of the sovereign state except in his brief filed by counsel on behalf of the defendant, and the Supreme Court rules the affidavits were properly admitted in evidence, is a Federal question involved that would merit consideration by the Supreme Court of the United States?

ARGUMENT

The issues involved in the present case are of limited application and confined to the present restricted factual situation. The questions involved are not of a substantial or exceptional nature, nor are they of sufficient importance to warrant consideration by the United States Supreme Court. *Duignan* v. *United States*, 274 U.S. 195 200; 71 L. Ed. 996.

At the onset, the attention of the court is called to the fact that while the petitioners assert that they were denied the right to confront and cross-examine their accusers, the witnesses against petitioners Leonard Barham, Luke Hamm, and Andrew Medlin were, at the request of petitioners' able counsel, called to the witness stand where they testified to the contemptuous acts of the said Barham, Hamm and Medlin. Record below No. 386, pages 76-78. While petitioners' counsel cross-examined at length Chief of Police C. C. Harris, the affiant in the affidavits objected to with regard to Barham and Medlin, about the contemptuous acts of other alleged contemptors, yet they asked no questions in their cross-examination concerning the said Barham or Medlin. When officer Wilkerson was

on the stand testifying as to the contemptuous acts of petitioner Luke Hamm. Record below No. 386 page 78, petitioner's counsel elected not to cross-examine this witness at all.

I.

No Federal Question Involved or Raised

During the trial of petitioners, affidavits were offered in evidence without objection from petitioners or their able counsel. The affidavits were received in evidence without objection. At no time did petitioners except to the judgment on the grounds that it violated due process of law under the Fourteenth Amendment. Neither did petitioners assign as error in their cases on appeal to the Supreme Court of North Carolina, the alleged denial of due process under the Fourteenth Amendment. (See records below: No. 385 p. 198, No. 386 p. 135, No. 388 p. 82, No. 390 p. 50-51, No. 391 p. 78). The question of due process under the Fourteenth Amendment was first injected in their case in petitioners' briefs in the North Carolina Supreme Court. (See petitioners' briefs below: No. 385 p. 53, 54, No. 386, p. 41, 42, No. 388, p. 24, 25, No. 390, p. 21, 22, No. 391, p. 23, 24).

It is well settled in North Carolina that objections to evidence not aptly made are waived.

Hunt v. *Wooten*, 238 N.C. 42, 65 S.E. 2d 503
Green v. *Spivey*, 236 N.C. 435, 442, 73 S.E. 2d 488
Grady v. *Walker*, 234 N.C. 734, 68 S.E. 2d 807.

The time for petitioners to voice an objection was when the affidavits were offered in the trial court.

> "Conceding that, as a piece of independent testimony a mere affidavit was not admissible, it was

competent for defendant to waive his objection" Connecticut, Mutual Life Insurance Company v. Hillmon, 188 U.S. 208, 214, 47 L. Ed. 446, 450.

The initiation in excluding improper evidence is left entirely to the opponent, and a rule of evidence not invoked is waived.

Hunt v. *Wooten*, 238 N.C. 42, 65 S.E. 2d 503, Supra
Lambros v. *Zrakas*, 234 N.C. 287, 289, 66 S.E. 2d 895
Diaz v. *United States*, 223 U.S. 442, 450, 56 L. Ed 500, 32 S. Ct. 250.

Petitioners and their counsel could and should have raised the question they seek to rely on in the trial court by simply objecting to the introduction of the affidavits in evidence. Their election not to make timely assertion of their right in the trial court amounted to a waiver or forfeiture thereof.

Yakus v. *United States*, 321 U.S. 414, 444, 88 L. Ed. 834
Edelman v. *California*, 344 U.S. 357, 97 L. Ed. 387, 73 S. Ct. 293
Jennings v. *Illinois*, 342 U.S. 104, 109, 96 L. Ed. 119, 72 S. Ct. 123
Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120, 89 L. Ed. 2092
Pennsylvania R. Co. v. *Illinois Brick Co.*, 297 U.S. 447, 462, 80 L. Ed. 796
Mutual Life Ins. Co. v. *McGraw*, 188 U.S. 291, 47 L. Ed. 480.

II.

No Federal Question Decided by the Court Below

Examination of the opinions below disclose that the cases were decided not on a federal question, but on the rules of evidence. The decisions rest on the necessity of an adverse party invoking a rule of evidence.

In the opinion below, *Cotton Mills* v. *Local 578*, 251 N.C. 218, 227, 111 S.E. 2d 459, petitioners' appendix page 43, the Court states that petitioners' contention is that the proof of the charges by affidavits deprived them of the right of confrontation and cross-examination guaranteed by the constitution. What constitution does the court refer to? The only specific reference to a constitution in the opinion is to Article I, Section 17 of the Constitution of North Carolina. Although the opinion does state that the "law of the land" guaranteed under the North Carolina Constitution is synonymous with due process of law, the reference is ambiguous and the court is apparently saying the same thing in a different way with no clear and affirmative showing that the reference was to "due process" as defined under the Fourteenth Amendment of the Constitution of the United States. The Court below subsequently stated that the North Carolina decisions accord with "due process of law" guaranteed by the Federal Constitution as interpreted in *Re Oliver*, 333 U.S. 257, 92 L. Ed. 682. Neither statement by the Court below raises a federal question or presents any conflict of decisions.

It is a well established principle of the Court that before it will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction and that its decision of the federal question was necessary to its determination of the case.

Darley v. *Mayo*, 351 U.S. 277, 100 L. Ed. 1178, 76 S. Ct. 806

Honeyman v. *Hanan*, 300 U.S. 14, 18, 81 L. Ed. 476

Lynch v. *New York*, 293 U.S. 52, 79 L. Ed. 191.

This Court has long held that a federal question first raised in the brief in the court below is not part of the record and insufficient to present a federal question. *Zadig* v. *Baldwin*; 166 U.S. 485, 41 L. Ed. 1087.

A mere discussion of a federal question is insufficient to raise the question.

Minnesota v. *National Tea Company*, 309 U.S. 551, 84 L. Ed. 920

Morrison v. *Watson*, 154 U.S. 111, 38 L. Ed. 927.

When the decision of the state court might have been based either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, this court will not undertake to review it.

Durley v. *Mayo*, 351 U.S. 277, 100 L. Ed. 1178, 76 S. Ct. 806, Supra

Williams v. *Kaiser*, 323 U.S. 471, 89 L. Ed. 398.

Neither will this Court undertake to pass upon questions of a constitutional nature which are not clearly necessary to a decision of the case.

Minnesota v. *National Tea Co., et al*, supra.

This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.

Herb v. *Pitcairn*, 324 U.S. 117, 125, 89 L. Ed. 789

Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120, 89 L.Ed. 2092, Supra.

Certainly a decision on federal or constitutional questions was not necessary in petitioners' cases, since the decision below rest on adequate, sufficient and independent state grounds.

III.

Sufficient Independent State Grounds to Support Judgments Below

There is sound authority in North Carolina to sustain the judgments of the court below:

> "This testimony was received in evidence, without objection. Therefore, though it is hearsay and also embraces the declarations of the alleged agent, (Parrish v. Mfg. Co.: 211 N.C. 7, 188 S.E. 817), it went to the jury for its full evidentiary value".
>
> *Lambros* v. *Zrakas*, 234 N.C. 287, 289, 66 S.E. 2d 895, Supra.

> "Dean Wigmore states the rule this way: 'the initiative in excluding improper evidence is left entirely to the opponent, so far at least as concerns his right to appeal on that ground to another tribunal. The judge may of his own motion deal with offered evidence; but for all subsequent purposes it must appear that the opponent invoked some rule of Evidence. A rule of Evidence not invoked is waived.' Wigmore on Evidence 3d Ed., Vol. I, Sec. 18, p. 321."
>
> *Lambros* v. *Zrakas*, supra.

> "'The right to except (i.e., object) is a privilege, which the party may waive; and if the ground of exception is known and not seasonably taken, by implication of law it is waived. This proceeds upon two grounds; one, that if the exception is intended to be relied on and is seasonably taken, the omission may be supplied, or the error corrected, and the rights of all parties saved. The other is, that it is not consistent with the purposes of justice for a party, knowing of a secret defect, to proceed and take his chance for a favorable verdict, with the power and intent to annul it as erroneous and void, if it should be against him'. Wigmore on Evidence, 3d Ed., Vol. I, Sec. 18, p. 322."
>
> *Lambros* v. *Zrakas*, supra.

The United States Supreme Court also adheres to the general rule as set forth in *Lambros* v. *Zrakas*, supra, *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126, 155, 85 L. Ed. 624, 641.

This is so even though the evidence be hearsay.

Stein v. *New York*, 346 U.S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077

Rowland v. *Boyle*, 244 U.S. 106, 108, 61 L. Ed. 1022

Diaz v. *United States*, 223 U.S. 442, 450, 56 L. Ed. 500, 32 S. Ct. 250, Supra.

Furthermore, it is well established that constitutional rights can be waived, both in a criminal as well as a civil case. In commenting on the waiver of constitutional rights in criminal cases, the court in *United States* v. *Hoyt*, 53 F. 2d 881, 885, observed:

> "Constitutional rights are not fixed and cannot be worn by a party as if they were an impervious armor through which he cannot be reached. They may be waived, and, indeed, they are continually waived in whole or in part in almost all the relationships of life, as is shown in the remarks of Mr. Justice Holmes, when a Justice of the Massachusetts Supreme Court in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 219, 29 N.E. 517, and cf. Gitlow v. Kiely (D.C.) 4 F (2d) 227, 229, 230, affirmed 49 F (2d) 1077 (C.C. A. 2)".

It has been recognized in North Carolina for some time that constitutional rights can be waived, and the Supreme Court of North Carolina has recognized such constitutional waivers in many cases, some of which are as follows:

Ex parte Steele, 220 N.C. 685, 689, 188 S.E. 2d. 132. Cert. den. 316 U.S. 686, 86 L. Ed. 1758

State v. *Anderson*, 228 N.C. 720, 47 S.E. 2d. 1
Cameron v. *McDonald*, 216 N.C. 712, 6 S.E. 2d, 497
In Re West, 212 N.C. 189, 192, 193, S.E. 134
State v. *Hartsfield*, 188 N.C. 357, 360, 124 S.E. 629
State v. *Mitchell*, 119 N.C. 784, 786, 25 S.E. 783.

The United States Supreme Court recognizes that Constitutional rights can be waived in criminal cases:

Stein v. *New York*, 346 U.S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077, supra.
Jennings v. *Illinois*, 342 U.S. 104, 96 L. Ed. 119, 72 S. Ct. 123, supra.
Parker v. *Illinois*, 333 U.S. 571, 92 L. Ed. 886
Yakus v. *United States*, 321 U.S. 414, 444, 88 L. Ed. 834, supra.
Diaz v. *United States*, 223 U.S. 442, 56 L. Ed. 500, 32 S. Ct. 250, supra.

Likewise, the lower Federal Courts have recognized that constitutional rights can be waived in criminal cases.

Key v. *United States*, 26 F (2d) 241
United States v. *Hoyt*, 53 F (2d) 884, Supra.
Carruthers v. *Reed*, 102 F (2d) 933
Beard v. *Sanford*, 105 F (2d) 141
United States v. *Napila*, 28 F (2d) 898
Barkman v. *Sanford*, 162 F (2d) 592
Jackson v. *Brady*, 133 F (2d) 476, cert. den. 319 U.S. 746, 87 L. Ed. 1702.

And the rights which may be waived have been held to include the right of confrontation and cross-examination.

Merchants Stock & Grain Co. et al v. *Board of Trade of City of Chicago*, 201 F 20.

IV.

No Denial of Due Process

Even if it be deemed that a federal question was properly raised, petitioners have not been denied due process. In their brief petitioners place considerable stress on Re Oliver, supra. North Carolina is in accord with the requirements of due process as set forth in *Re Oliver*, 333 U.S. 257, 92 L. Ed. 682, supra. See the opinion of the Court below, *Cotton Mills* v. *Local 578*, 251 N.C. 218, 228, 111 S.E. 2d 459, Supra. However, petitioners' case is completely lacking of the elements found by the court to deny due process in the Oliver case:

1. Oliver was tried summarily as a direct contempt, while petitioners' cases have been conducted throughout as indirect contempt.

2. Oliver was tried in secret, while the petitioners were tried publicly in the courtroom of the Vance County Superior Court.

3. Oliver was not permitted to have counsel, while petitioners were represented by as many as three competent and able attorneys. Cotton Mills v. Local 578, 251 N.C. 218, 229, 111 S.E. 2d 459, supra.

4. Oliver was not informed of his charges, nor was he given adequate notice of his trial. The petitioners here were informed of the charges against them and given ample notice and opportunity to prepare and present their defense.

5. Oliver was denied an opportunity to be heard, whereas, each of the petitioners testified in his own behalf, and most of them called numerous witnesses.

6. Oliver had, in effect, no opportunity to cross-examine, for as the court said in Re Murchison,

> 349 U.S. 133, 139, 99 L. Ed. 942, 75 S. Ct. 623, there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant. Here, the petitioners' counsel examined some witnesses, elected to waive the right of cross-examining another witness who was on the witness stand, and chose not to request confrontation or cross-examination of others.

In *Stein* v. *New York*, 346 U.S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077, supra, a factual situation similar to petitioners' was before the Court. In the Stein case, the defendant contended that his federal rights were infringed because he was unable to cross-examine accusing witnesses, i.e., the confessors. The Defendant further contended that the privilege of confrontation is secured by the Fourteenth Amendment. The Court approved the doctrine set forth in *West* v. *Louisiana*, 194 U.S. 258, 48 L. Ed. 965, 24 S. Ct. 650, in which it was decided that the federal constitution did not preclude Louisiana from using affidavits on a criminal trial. In disposing of the defendant's contention that the admission of confessions without an opportunity to confront or cross-examine the accusing witness, violated his rights under the Fourteenth Amendment, the Court observed:

> "Basically, Wissner's objections to the introduction of these confessions is that as to him they are hearsay. The hearsay evidence rule, with all its subtleties, anomalies, and ramifications, will not re read into the Fourteenth Amendment."
> *Stein* v. *New York*, supra, at p. 195-196.

The affidavits now contested by petitioners were no more than hearsay evidence and their introduction in evidence did not deny petitioners due process of law.

Jones v. *Buffalo Creek Coal Co.*, 245 U.S. 328, 329, 62 L. Ed. 325

American Railway Express Company v. *Kentucky*, 273 U.S. 269, 71 L. Ed. 639.

Examination of petitioners' records discloses that each had ample notice of the charges against him, that each had an opportunity to appear, testify, and present his defense, that each was represented by able counsel at all stages of the proceeding, and that a public hearing was held in each instance. The requirement of the Fourteenth Amendment is for a fair trial. *Massey* v. *Moore*, 348 U.S. 105, 108, 99 L. Ed. 135, 75 S. Ct. 145 and when the totality of the facts are examined, petitioners received a fair trial and were accorded due process of law throughout the proceedings below.

CONCLUSION

In conclusion, it is urged that since petitioners have failed to properly present any federal question in the manner prescribed by the rules of practice and by the decisions of this Court, and since the decision of the North Carolina Supreme Court is based on the settled law of evidence as applied by the courts of North Carolina, and does in no way depend upon any federal question, and since there was, in no event, any denial of due

process of law in the trial below, this Court should refuse to grant certiorari.

Respectfully submitted.

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